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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Respironics-Novamatrix, Inc., successor-in-interest  
to Novamatrix Medical Systems, Inc.

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Serial No. 76/118,859

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Bretton L. Crockett of TraskBritt, P.C. for Respironics-  
Novamatrix, Inc.

Ira Goodsaid, Trademark Examining Attorney, Law Office 115  
(Tom Vlcek, Managing Attorney).

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Before Simms, Seeherman and Quinn, Administrative Trademark  
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Respironics-Novamatrix, Inc., successor-in-interest to  
the original applicant, Novamatrix Medical Systems, Inc.,  
has appealed from the final refusal of the Trademark  
Examining Attorney to register MARS P02 TECH and design, as

shown below, for "medical devices, namely, pulse oximetry monitors."<sup>1</sup> The term PO2 has been disclaimed.<sup>2</sup>



Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark MARS, previously registered for "medical apparatus, namely, apparatus for recording, processing and analyzing patient physiological data,"<sup>3</sup> that, as used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

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<sup>1</sup> Application Serial No. 76/118,859, filed August 28, 2000, based on an asserted date of first use and first use in commerce of March 14, 2000.

<sup>2</sup> In the first Office action applicant was asked whether PO2 had any significance, and responded that "the term 'PO2' has no significance in the relevant trade or industry or as applied to the goods." In his brief, the Examining Attorney stated that during the preparation of the brief he discovered that "PO2" is merely descriptive. Although the appropriate procedure at that point would have been for the Examining Attorney to request that the Board remand the application so that he could require a disclaimer of the term, apparently in order to save time the Examining Attorney simply contacted applicant and, according to the brief, applicant's attorney authorized a disclaimer of the term on October 30, 2002. Although the file does not reflect an Examiner's Amendment inserting the disclaimer, the computerized records of the Office show the disclaimer, and applicant has not disputed that it was authorized. Accordingly, we have treated the disclaimer as having been entered into the record.

<sup>3</sup> Registration No. 1,988,794, issued July 23, 1996; Section 8 affidavit accepted; Section 15 affidavit received.

Applicant and the Examining Attorney have filed appeal briefs; an oral hearing was not requested.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E. I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the goods, the registrant's goods are identified as medical apparatus, namely, apparatus for recording, processing and analyzing patient physiological data. Such broadly identified apparatus would include the pulse oximetry monitors identified in applicant's application. In this connection, the Examining Attorney has submitted with his brief a definition of "oximeter," of which we take judicial notice, showing that it is "a device for measuring the oxygen saturation of arterial blood."<sup>4</sup> Applicant has attempted to limit the registrant's goods to

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<sup>4</sup> The American Heritage Dictionary of the English Language, 3d ed. © 1992. The Board may take judicial notice of dictionary definitions. **University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

"systems for processing and analyzing cardiological data relating to arrhythmia," relying on information obtained from the registrant's website<sup>5</sup> which features two models of the MARS arrhythmia review station. However, it is well established that the determination of likelihood of confusion must be based on the identification of goods set forth in the subject application and cited registration. See **Canadian Imperial Bank of Commerce v. Wells Fargo Bank, NA**, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); **In re William Hodges & Co., Inc.**, 190 USPQ 47 (TTAB 1976).

Applicant also characterizes the registrant's goods as a "data processing system" based on its assertion that the apparatus for recording, processing and analyzing patient physiological data is associated with a data processing system. We are not persuaded by this argument. The identification of goods in the cited registration is clear: it is apparatus for recording, processing and analyzing patient physiological data. Applicant's pulse oximetry monitors also process and analyze patient physiological data, namely, the oxygen saturation of arterial blood.

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<sup>5</sup> As applicant has pointed out, the registration has been assigned to GE Medical Systems Information Technologies, Inc.

Accordingly, applicant's goods must be deemed to be encompassed by the goods identified in the cited registration.

This brings us to a consideration of the marks. Although, as applicant points out, marks must be compared in their entireties, it is well established that there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In this case, we find that MARS is the dominant feature of applicant's mark. Visually it stands out, not only as the first word of the mark, but because of its depiction in thicker and bolder letters than the other terms and the design. As for the other elements, PO2 is the abbreviation for "partial pressure of oxygen" and has been disclaimed as descriptive. The term TECH is also highly suggestive, if not descriptive, of technical apparatus such as pulse oximetry monitors. As for the design element, which applicant describes as the edge of a planet, this merely reinforces the meaning of MARS which is, of course, the name of a planet. Moreover, in marks which combine words and designs, as a general rule words dominate over design elements because it is by the words

that people refer to the mark. **In re Appetito Provisions Co.**, 3 USPQ2d 1553 (TTAB 1987).

Thus, although we have compared the marks in their entireties, we find that it is the word MARS in applicant's mark which is the strongest source-identifying element. This word, obviously, is identical to the cited mark, which is MARS per se. MARS is clearly an arbitrary term for medical devices. Applicant has presented no evidence of third-party uses or registrations of other MARS marks. Thus, the registered mark must be deemed to be a strong mark which is entitled to a wide scope of protection.

As a result, consumers who are familiar with MARS for apparatus for recording, processing and analyzing patient physiological data are likely to assume, upon seeing MARS PO2 TECH and design on pulse oximetry monitors, that these monitors emanate from the same source, and that applicant's mark is merely a variation of the MARS mark.

Applicant has argued that its goods and those of the registrant are carefully selected and purchased by sophisticated buyers. Obviously these medical devices would be purchased by hospitals and medical personnel, and would not be bought on impulse. However, because of the similarity of the marks, and because the additional elements in applicant's mark are likely to cause

applicant's mark to be viewed as a variant of the registrant's mark, rather than as a different mark indicating a separate source, even sophisticated purchasers are likely to be confused.

Finally, in its appeal brief applicant's attorney has asserted that applicant is not aware of any instances of actual confusion. Uncorroborated statements of no known instances of actual confusion are of little evidentiary value. **In re Majestic Distilling Company, Inc.**, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Further, we note that applicant's claimed date of first use is March 2000, so that there has not been a significant amount time during which there has been contemporaneous use of the marks. Moreover, applicant has not provided any information as to the extent of its sales or its advertising, such that we could ascertain whether there has been a sufficient opportunity for confusion to occur if it were likely to occur. We also note that evidence of actual confusion is notoriously difficult to obtain, and that we have not heard from the registrant as to its experience as to any confusion that may have occurred. In these circumstances, we must find that this duPont factor is neutral.

Decision: The refusal of registration is affirmed.